Supreme Court, U.S.
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No. 02-117

In the
Supreme Court of the United States

STATE OF MINNESOTA,

Petitioner,

v.

JOAN MARTIN, GUARDIAN AD LITEM
FOR TROY HOFF,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

42 U.S.C. §§ 1396p(a)(1) and (b)(1) prevent states from imposing a lien "against the property of the individual prior to his death on account of medical assistance paid or to be paid on his behalf" or making any recovery for medical assistance. Minnesota law allows the state to place a lien on and to recover property of a recipient during their lifetime. As a condition of obtaining Medicaid, the individual must assign to the states the rights they have to "payment for medical care from any third party." 42 U.S.C. § 1396k(a)(1)(A). The states, not the Medicaid recipients, must actively and affirmatively pursue third parties for recovery of medical expenses. 42 U.S.C. §§ 1396a(a)(25)(B) ("the state or local agency will seek reimbursement for such assistance...") and 1396k (imposing upon the Medicaid recipient only a duty to "cooperate"). Minnesota law requires the recipients to recover for the State and requires them to apply all proceeds of the action to the State's medical expense claim. The questions presented are thus:

1. Where the Medicaid recipient has assigned all of her rights to medical payments and retains exclusive ownership of non-assigned claims that constitute her separate "property" under the common law of Minnesota, does 42 U.S.C. § 1396p prevent the State from taking or placing a lien upon the property of the recipient?

2. Where the State has failed to affirmatively pursue recovery from third parties to recover medical expenses, but has instead waived and released such rights against third parties completely, is it entitled to priority to the separately owned tort recovery of the Medicaid recipient?

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Joan Martin ("Respondent"), guardian ad litem for her son Troy Hoff ("Hoff"), respectfully opposes the petition for a writ of certiorari filed by the State of Minnesota ("State").

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 642 N.W.2d 1 (Minn. 2002). The opinion of the Minnesota Court of Appeals is reported at 615 N.W.2d 867 (Minn. App. 2000). The opinion of the Minnesota District Court is set out at Petitioner's Appendix at 78 (hereafter "A _").

JURISDICTION

The State has premised its petition on 28 U.S.C. § 1257(a).

Respondent points out, however, that the judgment of the Minnesota Supreme Court can be largely, if not entirely supported based on independent state statutory and common law grounds. The set of facts present in this case, where the State relied entirely upon lien rights with respect to property that, under Minnesota's common law, is solely the property of the Medicaid recipient, is unique. This set of facts is not likely to recur in Minnesota or elsewhere and does not conflict with any of the other decisions cited by the State. Moreover, placing a lien upon property of the recipient is clearly prohibited by the federal statute. This is no occasion for the Court to render advisory opinions about the validity of other state schemes that are unaffected by the ruling in Martin.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Medicaid, enacted in 1965 as Title XIX of the Social Security Act (the "Act"), is a publicly funded program that ensures that individuals who lack resources receive essential medical care. 42 C.F.R. § 430.0. The primary purposes of the Medicaid law are set out in its preamble and are to permit individuals who have limited means "to attain or retain

capability for independence for self-care" by paying for their medical and rehabilitation expenses. 42 U.S.C. § 1396 (1) and (2). Respondent's Appendix at 6 (hereafter "RA _").

42 U.S.C. § 1396a sets out a laundry list of requirements for state plans that implement the cooperative Medicaid system. Two of the required items that the state must enact as part of its plan are (i) a "no-lien, no take" provision (see 1396a(a)(18)) as more specifically mandated by 1396p(a)(1) and 1396p(b)(1) and (ii) an action plan (see 1396a(a)(25)) that obligates the states to enforce rights assigned to them by the recipient to collect medical care costs from responsible third parties. The assignment is mandated by 1396k(a).

42 U.S.C. § 1396a(a)(18) provides, in relevant part:

> ...a State plan for medical assistance must - ...(18) comply with the provisions of section 1396p of this title with respect to *liens, adjustments, and recoveries* of medical assistance correctly paid...(italics added).

42 U.S.C. § 1396p(a)(1) provides in relevant part:

> No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid...

42 U.S.C. § 1396p(b)(1) provides in relevant part:

> Adjustment or recovery of medical assistance correctly paid under a state plan
>
> > (1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the state plan may be made...

42 U.S.C. § 1396a(a)(25)(A),(B), and (H) provide in relevant part:

> A state plan for medical assistance must –
> (25) provide –

(A) that the State *or* local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties...to pay for care and services available under the plan including...

(B) that in any case where such legal liability is found to exist *after* medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the cost of recovery, *the State or local agency* will seek reimbursement for such assistance to the extent of such legal liability;...

(H) that to the extent that payment *has been made* under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the state has in effect laws under which, to the extent that payment has been made under the State plan *for medical assistance for health care items or services furnished to such individual*, the State is considered to have acquired the rights of such individual to payment by any other party *for such health care items or services*; (italics added).

42 U.S.C. § 1396k provides in relevant part:

(a) For the purpose of *assisting* in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance..., a State plan for medical assistance shall –

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required –

(A) to *assign to the State any rights*, of the individual or of any person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights...*to payment for medical care from any third party*;...

(B) to *cooperate with* the State in identifying, and providing information to *assist* the State in pursuing, any third party who may be liable to pay for the care and services available under the plan...;

(b) Such part of any amount *collected by the State* under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical expense payments made on behalf of an individual with respect to whom such assignment was executed...and the remainder of such amount collected shall be paid to such individual. (Italics added).

Minn. Stat. § 256B.056 subd. 6 provides in relevant part:

To be eligible for medical assistance a person must have applied or must agree to apply all proceeds received or receivable by the person...from any third person liable for the costs of medical care for the person...[T]he state agency shall require from any applicant or recipient of medical assistance the assignment of any rights to medical support and third party payments...[B]y signing an application for medical assistance, a person assigns to the department of human services all rights the person may have to medical support or payment for medical expenses

from any other person or entity on their own or their dependent's behalf and agrees to cooperate with the state in…obtaining third party payments…

Minn. Stat. § 256B.042 provides in relevant part:

> **Subd. 1. Lien for cost of care.** When the state agency provides, pays for, or becomes liable for medical care, it shall have a lien for the cost of the care upon any and all causes of action or recovery rights…which accrue to the person to whom the care was furnished, or to the person's legal representatives, as a result of the illness or injuries which necessitated the medical care;…

Minn. Stat. § 256B.37 provides in relevant part:

> **Subd. 1. Subrogation.** Upon furnishing medical assistance to any person who… has a cause of action arising out of an occurrence that necessitated the payment of medical assistance, the state agency or the state agency's agent shall be subrogated, to the extent of the cost of medical care furnished, to any rights the person may have…under the cause of action.
>
> The right of subrogation created in this section includes all portions of the cause of action, notwithstanding any settlement allocation or apportionment that purports to dispose of portions of the cause of action not subject to subrogation…

STATEMENT OF THE CASE

A. Federal and Minnesota State Laws

Contrary to the claim of the State, the primary purpose of the Medicaid law is not to make the State the payor of last resort. Instead, the primary purposes of the Medicaid law, as expressed in the preamble, are to (1) furnish medical

assistance to citizens of limited means and (2) to permit individuals "to attain or retain capability for independence for self-care . . ." 42 U.S.C. § 1396. These primary purposes are then achieved by two important sub-purposes, these being (1) preventing the State from impoverishing Medicaid recipients by taking property or placing liens on their separately owned property, thus permitting them, during their lifetime, to maintain dignity and to enjoy their lives within their physical and mental limitations while, at the same time (2) giving to the states the exclusive right and obligation to collect for all medical payments paid or payable from third parties. The latter provision makes the state the "payor of last resort" with respect to medical claims, subject to the equally important limitation on the state's ability to encumber the property of recipients. These "dual federal objectives" were noted and followed by the Minnesota Supreme Court in its decision. A 27.

The dual objectives of Congress are enforced in the "no-lien, no take" provisions set out at 42 U.S.C. §§ 1396a(a)(18) and 1396p and the obligation of the states to have in place an "affirmative action plan" *obligating the states* to recover benefits from responsible third parties set out in 42 U.S.C. § 1396a(a)(25). The recipients are required to assign to the states all rights they have against third parties for "payment for medical care" pursuant to 42 U.S.C. § 1396k. See H.R. Conf. Rep. 453 at 544-45 (beneficiaries are not required to pursue recovery; pursuit is the responsibility of the state). These four provisions are the focus of this case.

States have enacted widely different laws to effectuate the primary purpose of Congress of permitting recipients to attain or retain capability for independence for self-care. Minnesota statutes, as interpreted by the Minnesota Supreme Court and Minnesota common law applicable to the facts of this case are the subject of the petition to this court.

42 U.S.C. § 1396k(b) provides for payment to the recipient of any sum the state collects for medical benefits

beyond what is necessary for the state to be reimbursed for what it has paid *in the past*. This is possible because the statute requires that the recipient assign the *entire* claim for medical care – past and future included. The recipient might have paid some of the past medical expenses, either privately or from available insurance. The settlement or verdict also might include sums for future medical care. 1396k(b) makes clear that before any other payor (past or future) of medical expenses is reimbursed, the state must be reimbursed in full. It does not mean that the assignment includes all claims for damages against third parties.

Minnesota's statutes regarding Medicaid reimbursement are contrary to federal law because they purport to take property of the recipient and are not limited to reimbursement from the assigned claim for recovery of medical benefits. Specifically, Minn. Stat. § 256B.042 subd. 1 gives the State a lien for all benefits paid or to be paid on the entire cause of action of the recipient. Minn. Stat. § 256B.056 subd. 6 requires a recipient to "apply all proceeds" of her entire cause of action to the payment of medical expenses paid by the State, and is not limited to that part of her cause of action assigned to the State. Minn. Stat. § 256B.37 gives the State a right of subrogation for medical expenses paid by the State over the recipient's entire recovery, not just that portion limited to the rights to recover for medical benefits.

B. Facts of the underlying litigation and decisions of lower courts.

On July 10, 1991, Hoff was involved in a motor vehicle accident. As a result, he suffered a serious brain injury that left him permanently and totally disabled as well as mentally incompetent. A 10. Hoff's mother, Joan Martin, filed an application for medical assistance with the State and the State began making payments on November 25, 1991. Id.

Thereafter, the State made medical assistance payments on behalf of Troy Hoff pursuant to the provisions of Minn. Stat. § 256B.042 and 42 U.S.C. § 1396, with the payments commencing on November 25, 1991. Id. On May 23, 1993, Respondent, on behalf of Hoff, made an assignment, as mandated by Minn. Stat. §256B.056 subd. 6, that reads:

> As a condition of eligibility for Medical Assistance, I assign to the State of Minnesota any rights available to me under automobile or private health care coverage and any rights to payment for medical care from any third party for myself or my dependents. I agree to cooperate with the State in any legal action brought against a third party for payment of medical expenses or subsistence.

RA 1. In addition, on June 21, 1993, the State filed a lien in the Office of the Olmsted County Recorder for the cost of Medicaid benefits provided to Hoff. RA 2-5. The lien reads:

> That pursuant to Minn. Stat. 256.015 and 256B.042, the Minnesota Department of Human Services for the *State of Minnesota does hereby claim a lien* for the cost of the aforesaid public assistance benefits provided to the injured person, *upon any and all causes of action accruing to said injured person*, or to his legal representative as a result of the aforesaid occurrence.

RA 4. (Italics added).

Respondent initiated this lawsuit on September 2, 1993, in an effort to recover damages to compensate Hoff for lost wages, loss of future earning capacity, disability, past and future pain and suffering, disfigurement and emotional distress. A 11. In furtherance of her duty under 42 U.S.C. § 1396k(a)(1)(C) to "cooperate" with the State, Respondent

joined the State as a Plaintiff on Impleader in order to permit the State to pursue its separate claim for the medical expenses. A 25. In response, the State relied upon the lien referred to above. A 12 and footnote 3. The State never asserted a subrogation right either in its original or any amended pleading.

Over the next six years, the lawsuit was vigorously litigated. The record reveals that the State failed to participate in the litigation to recover from the defendants the medical expenses that it had the exclusive right to recover pursuant to the assignment given by the Respondent. A 81 (trial court finding of fact no. 12). The State paid none of the expenses of this litigation, refusing to fund or share in any expenses of the Respondent.[1] The State never appeared at any depositions or motions, and never filed a brief or appeared at oral argument in the two pre-settlement appeals.[2] The State served no discovery and did not participate in answering any discovery. The State did not pursue any independent investigation of the facts or consult any experts. Even though the State was a party to the lawsuit from its inception, no one from the State ever appeared in the Olmsted County District Court until after the case was settled.

At the court ordered settlement conference on June 23, 1999, the Respondent settled her cause of action (for Hoff's pain and suffering, disability, emotional distress, disfigurement, loss of earnings and loss of earning capacity) with Defendant City of Rochester for the sum of $145,000. Shortly thereafter, Respondent agreed to settle her causes of action for the same types of damages against the remaining Defendants for $45,000 (Rochester Township) and $30,000

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[1] The expenses in this case are reflected in the papers filed with the motions to approve the minor settlements reached with the defendants, and total $42,423.49.

[2] See, Martin v. City of Rochester, et al, 1997 WL 161821 (Minn. App. 4-8-97, file no. C8-96-1749) and 1998 WL 566825 (Minn. App. 9-8-98, file no. C8-98-654).

(Estate of Donald Tlougan). The State made no attempt to settle with the defendants for the medical assistance payments it had made. Instead, relying solely upon its "lien" rights under the statutes, the State released all of the settling defendants from its separately owned claim for medical benefits. A 13.

After the settlements were concluded, the Respondent filed a motion to dismiss the claims of the State to the proceeds of the settlements. A 14. For the first time, in its memorandum opposing the motion to dismiss, the State asserted a subrogation claim under Minn. Stat. § 256B.37. A 15.

In response to the motion of Respondent, the State offered several items of documentary evidence setting forth the interpretation of the federal agency charged with administering the Medicaid law, the Health Care Finance Administration (HCFA). The State asserted these interpretive documents show HCFA's approval of the Minnesota statutes and resolved an ambiguity in the federal scheme.

After the hearing on September 29, 1999, the Hon. James Mork dismissed the claims of the State to the settlement proceeds, holding that the federal law was not ambiguous and plainly prohibited the imposition of a lien. A 80. Judge Mork further found as fact that the State, even though it had been impleaded, failed to independently pursue its separately owned cause of action for medical benefits provided to Hoff. A 81. Judge Mork also ruled that the State's claim for subrogation was also invalid as violating the no-lien prohibition of the federal statute, but even if it was valid, it had not been timely asserted. Id.

The State then appealed to the Court of Appeals. That court reversed, holding that the State could enforce a lien to protect its "legitimate subrogation interest." A 75. That court, however, failed to address the effect of the assignment upon Respondent's ability to pursue a claim on behalf of the State, failed to discuss whether the subrogation statute (Minn.

Stat.§ 256B.37) conflicted with the federal "no-lien" provision and failed to consider whether the trial court was correct in holding that there had been waiver of the subrogation claim. In addressing the "no lien-no take" provision of federal law, the Court of Appeals was impressed with holdings from other jurisdictions that held that a lien was being place upon the property of third parties, but did not base its decision on those cases. A 74. The court based its decision upon a Second Circuit case that concluded that *New York law* provided a specific exemption from the no-lien requirement of the *New York statute*. A 75.

C. Decision of the Minnesota Supreme Court

Martin then petitioned for review by the Minnesota Supreme Court, and review was granted on October 18, 2000. That court issued its decision on March 23, 2002. In a comprehensive and careful opinion, the Minnesota Supreme Court gave due consideration to all of the arguments and evidence submitted by the State. The court noted the direct conflict between the flat prohibition of liens on recipient's "property" under federal law (42 U.S.C. § 1396p) and the Minnesota statute expressly giving the State such a lien (Minn. Stat. § 256B.042 subd. 1). A 17. The court found that, under Minnesota common law, a cause of action is "property". A 18. The court discussed the assignment requirement of federal law (42 U.S.C. § 1396k) and expressed doubt that Minnesota's statute regarding assignment, Minn. Stat. § 256B.056, subd. 6, was broader than federal law permitted. A 18-20.

The court carefully discussed preemption doctrine, noting that this Court had previously ruled in Schweiker v. Gray Panthers, 453 U.S. 34, 37 (1981) that a state's Medicaid plan must conform to federal requirements. A 20-21. In seeking to harmonize the state and federal schemes, the Minnesota Supreme Court adopted the "plain meaning" of the federal

law and concluded that the federal no-lien provision was unambiguous. A 22. Specifically, the court held that:

> The provision [1396p(a)(1)] means exactly what it says—prior to his death, no lien may be placed on the property of a medical assistance recipient for recovery of medical assistance paid.

Id. The court interpreted the assignment provision (1396k) and the recovery provision (1396a(a)(25)(H)) observing that both of these provisions are specifically limited to health care items and services. Id. at 24. Specifically, the court found:

> ...when interpreted according to its plain language and consistent with the federal scheme, the only fair reading of the third-party recovery provision limits the state's recovery to third-party payments for medical or health care.

Id. at 25. The court held that, under Minnesota common law, the assignment to the State of the claim for medical benefits left the recipient with no right to make a recovery, but left the State with the right to pursue third parties directly including both tortfeasors and insurers. Id. The court also held that under Minnesota common law an injured party acquires, at the time of an accident, several rights of action against the third party that are akin to a "bundle of sticks." A 28. After assignment of one stick to the State (the claim for medical benefits), the State is the sole owner of that claim and the recipient is the sole owner of the remaining claims (claims for loss of earnings, loss of earning capacity, disability, disfigurement, emotional distress, pain and suffering). A 29. The latter claims are the recipient's property and are protected by the no-lien provision of federal law. Id.

The court then applied preemption analysis, having due regard for the conclusions the court reached regarding the

effect of Minnesota common law. A 30. The Minnesota statute allowing a lien on a recipient's property before the recipient's death (256B.042, subd. 1) is prohibited by federal law and was therefore preempted to the extent it allowed a lien for medical assistance before the recipient's death. A 31. The Minnesota statute regarding assignment (256B.056, subd. 1) was interpreted such that it was limited to assignment for the claim for medical benefits and thus was not preempted as interpreted by the court. A 33-37. The Minnesota statute regarding subrogation (256B.37) was invalidated because, under Minnesota common law, once the claim for medical benefits had been assigned to the State, subrogation was not appropriate because the State was the owner of that claim and did not need to be subrogated. A 40. To the extent subrogation allowed the State to take the non-assigned property of the Respondent, it was preempted by federal law. Id.

The court then carefully considered each of the State's other arguments and rejected them all. Specifically, the court found no ambiguity in the federal scheme and therefore did not defer to HCFA. It also concluded that, even if there was an ambiguity, the agency interpretation was not entitled to Chevron-style deference because it was not a product of formal rule-making, and thus only entitled to "respect" based upon its ability to persuade, citing Christenson v. Harris County, 529 U.S. 576, 587 (2000). The court was not persuaded by the interpretation of the agency. A 41-44.

Importantly, for purposes of this petition, the court did not make a final ruling on the priority argument advanced by the State (the second "question presented" in the State's petition; see, Petition at i), holding that instead of violating federal law there were other ways for the State to protect itself and thus perhaps be put in a position of priority. A 44.

The court carefully analyzed and distinguished the cases from other jurisdictions, rejecting each because they did not discuss the federal preemption argument or because, under

the particular laws of those states, liens were not placed upon the property of the recipients. A 44-47. Finally, the court gave due consideration and rejected each of the arguments advanced by the dissent in the opinion. See, footnotes throughout.

Because the State had made a choice to release the tortfeasors instead of affirmatively pursuing them and making a separate settlement, the court then remanded the case to the trial court with specific instructions to hold a fact hearing to allocate the settlement proceeds between the assigned and non-assigned claims. A 53-54.

REASONS FOR DENYING THE PETITION

A. Introduction and summary of argument.

Because of the unique circumstances of this case, the Minnesota Supreme Court never reached the issue of *priority* to the proceeds of a recovery that the State seeks to litigate in this Court (the second "issue presented" in the State's petition) – that is, *if the State had participated fully in the litigation and had made a separate settlement*, or *if the case was litigated by the State and there was a limited fund from which to pay the verdict*, was the State entitled to have its claim for medical expenses paid before Respondent was paid anything? The Minnesota Supreme Court chastised the State for not pursuing the tortfeasors directly and perhaps recovering more rather than disputing the Respondent's settlement. A 44. Indeed, the ultimate ruling of the court acknowledged uncertainty over the scope of the releases given and remanded to the trial court, in this unique set of circumstances, for an apportionment hearing. A 53.

The State can argue, in another case where it separately and affirmatively pursues its right to recover, whether it has *priority* to the proceeds of a settlement. Depending upon the ruling of the Minnesota Supreme Court in that case, the State may have a better chance at establishing a conflict in the rulings of the lower courts.

Unlike all of the other cases cited, the Respondent could not settle the State's claim for medical expenses when she settled with the defendant tortfeasors – *instead she only attempted to settle that portion of the case that she still owned* – the claims for her son's wage loss, loss of earning capacity, disfigurement, emotional distress, and pain and suffering. The State, erroneously believing it owned a portion of her settlement, then gave a release to the tortfeasors of the medical expense claim. Under Minnesota's unique common law, Respondent's non-assigned cause of action was "property" that was divisible and separate (as a "bundle of sticks") from the State's claim. Consequently, the Respondent did not own and *could not settle* the State's separate claim for medical expenses. The State made no separate settlement with the tortfeasors for medical expenses but instead sought to take a portion of Respondent's settlement.

Contrary to the claim made by the State, there was no attempt to "label" a portion of the settlement recovery as being for non-medical damages. Under Minnesota common law, because of the assignment, Martin did not own and could not settle for the medical expenses. Thus, there can be no "labeling" under Minnesota common law. The State alone owned the right to settle its separate claim for medical expenses and made a conscious choice in this case to sign releases in favor of the tortfeasors instead of actively and separately pursuing them.

This is the only case, of all those cited by the State, where the state was a *party* to the litigation from the beginning of the litigation. The Respondent joined the State involuntarily as a party to the litigation. A 11. This is important because the State was "in control" and could have fully participated in the litigation. Under Minnesota common law, once Respondent assigned to the State the rights to payment for medical expenses, she no longer owned that right and could not collect those damages. Joinder of the State as a party was

mandated by Minnesota Rule of Civil Procedure 19 (joinder of persons needed for a just adjudication). Instead of actively and affirmatively participating in the litigation as required by 42 U.S.C. §§ 1396a(a)(25) and 1396k, the State did nothing, relying exclusively upon its lien in respect to claims for damages that had not been assigned to the State and which remained the exclusive property of Respondent. The State signed releases in favor of the tortfeasors because it claimed a right to take Respondent's property – the settlement for her son's non-assigned damages – thus consciously putting itself in a position where the damages must be apportioned.

The Minnesota Supreme Court merely concluded that the State's failure to participate in the litigation (1) when it was a party and where Respondent neither owned nor could make any claim to the assigned right for medical expense damages, and (2) was seeking to recover for medical benefits solely from property owned by Respondent, violated the clear prohibition of 42 U.S.C. § 1396p, which prohibits the states from either *taking* property from a recipient or *placing a lien* on property of a recipient during his lifetime.

There is no intolerable conflict among the decisions of the nation's lower courts. Any inconsistency in rulings is easily explained by the distinguishing facts specific to the cases cited by the State. These facts relate both to the different state statutes considered by the various courts, the differing state common law applied to those statutes, and to the unique facts of this particular case. In fact, there is no conflict between the lower courts when these differences are understood and analyzed.

Consequently, there is no important national question for this Court to decide. There is no need for this Court to grant certiorari now because the "conflict" may well disappear with time and, if a conflict truly develops over time, a better case will present itself where the constitutional issue is less entangled with state law issues and the Supremacy Clause issue can be better isolated.

B. Martin does not conflict with decisions of other courts on the same issue.

1. The issue in Martin is not the same issue presented in the other cases.

The issue in Martin was unique. Unlike any of the other cases cited by the State, the state was (1) a party to the litigation and (2) the settling plaintiff (Respondent Martin) could not separately settle the claim of the State. Instead, Respondent consistently maintained throughout the litigation that she did not own and could neither settle nor release the State's separately owned claim for medical expenses. Because of Minnesota's unique common law and unique statutes, the result in Martin is both correct and necessary under the federal scheme.

Under Minnesota common law, a cause of action is personal property. A 18. *Under Minnesota common law*, a cause of action is divisible into separate parts, which are capable of being separately assigned. A 20-29. Thus, Respondent's claim for medical expenses was separately assigned to the State, leaving her with the other claims for her son's loss of earnings, loss of earning capacity, disfigurement, disability, emotional distress, pain and suffering. Id. *Under Minnesota common law*, an assignment has the legal effect of divesting the assignor of any interest in the property assigned. A 25-26. Thus, after the assignment the Respondent did not own, could not litigate, and could not release the claim for medical expenses. Importantly, she had no ability to "label" a portion of her separate settlement as being for medical expenses, because only the State could negotiate a settlement of that claim.

Instead of litigating and separately settling the claim for medical expenses, the State *did nothing* in the District Court litigation. The State let Respondent take 20 depositions, pursue two pre-settlement appeals, spend over $42,000 in out of pocket expense (refusing to participate in the expenses),

oppose two summary judgment motions and numerous pretrial motions *in limine*, and mediate a separate settlement for her claims. After doing no work and spending no money, the State then voluntarily gave a release to all three tortfeasors, relying exclusively upon the claim of a lien against the separately owned claims of the Respondent for her son's loss of earnings, loss of earning capacity, disability, disfigurement, emotional distress, pain and suffering.

Given the plain meaning of the federal "no-lien/no-take" statute (42 U.S.C. §§ 1396p(a)(1) and 1396p(b)(1)), the Minnesota Supreme Court had no alternative under the facts of this case, the unique Minnesota statutes, and the common law of Minnesota as applied to the facts and statutes. This set of facts, this same set of statutes and the same common law are unlike any of the other cases relied upon by the State, and are unlikely to repeat itself in Minnesota.

The Minnesota court *did not decide* the "priority" issue that the State wants to litigate if this Court grants the petition. Instead, the Minnesota Supreme Court made clear it was troubled by the argument that parties could potentially "label" portions of a settlement. A 44. The court stated:

> But the state has options other than to ignore a clear provision in federal law that prohibits a lien from being imposed against the property of any individual on account of medical assistance paid. The state can protect its right to reimbursement by participating in the litigation so as to ensure recovery of medical costs paid. In this case, the state did not actively participate in the litigation until settlement, despite being a plaintiff on impleader. But the state did participate at the settlement and did release each defendant from any liability to the state for medical expenses. At this time, the state did establish its claim to part of the settlement proceeds—but in a dispute solely with Martin.

The court further explained its decision by noting that the State has no interest in the claims of the recipient after the assignment. A 48. However, the State is not precluded from making a full recovery, because it can take direct, immediate action against tortfeasors and has no limitation upon the amount of the recovery it can make. Id. at footnote 28.

It was only because of the unique circumstances of this case, where the State abrogated its responsibility to directly and independently pursue recovery that the State is now forced to engage in a fact hearing regarding "allocation" of the proceeds of the settlement. If the State, in a future case, directly pursues its recovery rights for medical expenses, it can still argue it has a "priority" to the recovery in the event the actual recovery is insufficient to pay all of the claims of the State and the recipient.

This Court has generally been loathe to grant certiorari in cases where the issue presented puts the Court in a position of rendering an advisory opinion. Hall v. Beals, 395 U.S. 45, 48 (1969); Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129 (1946); Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436 (1792). The State is asking this Court to decide a general issue concerning priority to proceeds of settlements under the Medicaid law, where the Respondent could only settle as to property owned by her and which did not, as a matter of Minnesota common law, represent any recovery for medical expenses paid by the State. The facts of this case do not call for a decision on the general issue the State seeks to raise in this Court, nor did the Minnesota Supreme Court decide the issue presented in the petition for a writ of certiorari.

2. Martin does not conflict with decisions of the highest courts of three sister states.

The State cites four cases in support of its claim of conflict. Wilson v. State, 10 P.3d 1061 (Wash. 2000); Wallace v. Estate of Jackson, 972 P.2d 446, 448 (Utah 1998)

and its companion case S.S. v. State, 972 P.2d 439, 442 (Utah 1998); Cricchio v. Pennisi, 90 N.Y.2d 296, 660 N.Y.S.2d 679, 683 N.E.2d 301 (N.Y. 1997); Norwest Bank v. Doth, 159 F.3d 328, 334 (8th Cir. 1998). All of these cases are distinguishable. None are in conflict with Martin.

In Wilson (a 5-4 decision), Wallace and S.S. (both 3-2 decisions) and Cricchio the Courts all concluded that the no-lien provision was irrelevant because the state placed a lien on the recovery itself, and therefore not on the "property" of the recipient. Wilson, 10 P.3d 1061, 1065-66; S.S., 972 P.2d 439 at 442 (Utah 1998); Wallace, 972 P.2d 446 at 448; Cricchio, 683 N.E.2d 301 at 306. This conclusion was premised upon those states unique statutes that placed the lien upon the property of the third party who owed money for the injuries to the recipient and *not on the cause of action of the recipient.* Moreover, the settlements in those cases made by each recipient included the claim for medical expenses, reflecting those courts' failure to deal with the limited nature of the assignment permitted under federal law. In other words, none of those courts addressed the question of whether the assignment given pursuant to 42 U.S.C.§1396k included the entire cause of action or just the claim for medical expenses. It is unknown whether a cause of action is property under the common laws of Washington, Utah or New York. It is unknown whether in Washington, Utah or New York a cause of action is divisible such that the claim for medical expenses can be separately assigned.

Washington relied on Utah, which in turn relied on the New York case, Cricchio v. Pennisi, which also concluded that the lien on settlement proceeds attaches to the property of a third party. 683 N.E.2d 301, 306 (N.Y. 1997). Strangely, the New York court concluded that New York's statutory analogue to the federal no-lien provision was not violated by the imposition of a state lien because the *state statute created an exception for the lien*, yet the court did not explain how this state-created exception could trump the federal no-lien

provision. Cricchio, 683 N.E.2d at 304. In short, the New York court did not address the no-lien mandate of 1396p, but instead only interpreted the exception to that requirement created by the New York statute.

The Eighth Circuit did not address the issue before this Court—the validity of state medical assistance liens and whether such liens could be satisfied out of the entire settlement, or only that part attributable to medical expenses. Norwest Bank v. Doth, 159 F.3d 328, 334 (8th Cir. 1998). Further, Doth did not mention the no-lien provision (1396p) at all. Id.

Doth instead addressed medical assistance recipients' ability to place third-party settlement proceeds in supplemental needs trusts (SNT) ahead of the state's medical assistance liens. Funds in SNTs remain inaccessible to the state until the recipient's death. Doth, 159 F.3d at 33 1-32. Doth dealt with a situation in which recipients were attempting to place the *entire* recovery from third-party tortfeasors into a SNT, a very different and more drastic limitation on a state's ability to recover. This case only addresses the limits of the state's ability to recover from the separately owned property of the recipient.

3. Martin does not conflict with other courts concerning a State's ability to recoup expenses from all portions of a third party recovery.

The State cites two cases – Calvanese v. Calvanese, 688 N.Y.S.2d 479, 710 N.E.2d 1079 (1999) and Sullivan v. County of Suffolk, 174 F.3d 282 (2nd Cir. 1999). Neither case presents a direct conflict with Martin.

Calvanese involved the issue of placing proceeds of a settlement in a SNT, similar to Cricchio and Doth. There was no reference at all to the no-lien provision at 1396p(a)(1) or the no-take provision at 1396p(b)(1). The court specifically

referred to a lien permitted under New York law as a substitute for direct action by the state. 93 N.Y.2d at 117. In other words, that court interpreted the lien given under New York law without reference to the federal prohibition of such liens.

Calvanese involved a settlement in which the plaintiff settled the entire case, including the state's claim for medical benefits. The State of New York was not a party to the underlying action. The New York court did not address the effect of the assignment upon the plaintiff's right to sue for medical expenses. In other words, that court did not address the question of whether the assignment given pursuant to 42 U.S.C. § 1396k included the entire cause of action or just the claim for medical expenses.

Similar to the Eighth Circuit in Doth, the Second Circuit in Sullivan did not address the federal no-lien provision nor consider preemption of state laws. Specifically, the Second Circuit addressed the "general rule that the state may not encumber a Medicaid recipient's property prior to death," but cited only a New York version of the no-lien statute and relied upon a New York state-created exception. 174 F.3d at 285.

C. Martin does not conflict with rulings of the Departmental Appeals Board, but even if a conflict exists, such rulings are neither reasonable nor persuasive. The HCFA interpretations are not entitled to deference.

1. The DAB rulings are not in conflict with Martin.

The state has referenced two adjudications made by the Department of Health and Human Services Appeals Board (Board). Cal. Dep't of Health Sw-vs., DAB No. 1504 (Dep't of Health & Human Servs. Jan. 5, 1995); Wash. State Dep't of Soc. and Health Services, DAB No. 1561 (Dep't of Health

& Human Servs. Feb. 7, 1996). Both adjudications addressed whether HCFA properly withheld federal funds from a state program based on the state's failure to recover a sufficient amount from settlements between recipients and third-party tortfeasors. In both the California and Washington adjudications, the Board stated that HCFA properly characterized recoveries from third parties first as payments for medical care. The Board reasoned that "[t]his characterization prevents manipulation of tort awards by recipients who seek to prevent the public from being reimbursed for the funds it has advanced for their medical care (e.g., by suing for pain and suffering or lost wages rather than for medical costs)." DAB No. 1561, p. 5.

These agency adjudications are not in conflict with Martin because they do not address the central issue presented here, which is whether the federal no-lien provision preempts state laws that purport to allow states to impose liens on recovery of amounts not designated as payment for medical expenses. The agency adjudications do not mention the federal no-lien provision.

Minnesota statutes allow liens directly upon property that, under the common law of Minnesota, is exclusively the property of the Medicaid recipient. Both of those adjudications assumed that the recipient had made a single recovery for both the medical expenses and the other damage claims. This is not the law in Minnesota where, after the assignment, the Respondent had no right to sue for or make a recovery for the medical expense claim owned solely by the State. If the State had not voluntarily given a release in this case, it could still pursue its full recovery against the tortfeasors.

2. The DAB rulings are not entitled to deference.

Agency interpretations are only entitled to Chevron deference if they are reasonable. Chevron, U.S.A., Inc. v.

National Res. Def. Council, 467 U.S. 837, 843-44 (1984). In the California adjudication, the Board acknowledges that the statute only refers to an assignment of "payment for medical care." DAB No. 1504; see also DAB No. 1561 (relying on DAB No. 1504). However, the Board then concludes "the statutory scheme as a whole contemplates that the actual recovery might be greater, and, if it is, that Medicaid should be paid first." Id. The Board gives no explanation for this broad analytical leap. This is such a significant departure from the plain language of the no-lien statute that it is unreasonable and not entitled to deference under Chevron.

Moreover, the Minnesota Supreme Court has not addressed the issue of priority in circumstances where both the state and the recipient separately sue for a recovery and the fund available to make a recovery is insufficient to satisfy both claims. The State could have recovered its entire claim from the tortfeasors in this case, but gave up that right and sought instead to collect only from the Respondent's recovery for other damages.

3. HCFA's interpretations are not entitled to deference.

The State asserts that HCFA has "consistently" decided that the no-lien provision does not bar a state from imposing a lien on a medical assistance recipient's rights to recover for other than medical care. HCFA interpretations have not been consistent over time nor are they entitled to deference.

There is no evidence that HCFA's interpretation has been applied consistently over time. Instead, HCFA's interpretations are of very recent vintage. While federal statutory provisions have been in place for may years (most from 1965 and some changes in 1985 and 1993), all of the State's "interpretive" evidence dates from the 1990's, and the majority of that dates from 1994 and later. There is no proof that the various state agencies or state legislatures have interpreted 1396p consistently over the years and no evidence

at all of the various legislative responses to OBRA '93 (42 U.S.C. § 1396p(d)(4)) that clarified the right of the recipients to shield their tort recoveries from the states until their death or age 65.

Also, the Wilks' memo (A 235-36) agrees with the reasoning of the Minnesota Supreme Court. It reads, in part:

> If, under State law, a lien is not being placed upon the Medicaid recipient's property [Minnesota law], but rather is being laced upon the tortfeasor's (the defendant in the personal injury litigation) property [Washington, Utah and New York law] or upon funds which are set aside to be used in a settlement of the litigation, but which have not become the recipient's property, then there would be no conflict with 1917(a) [1396p(a)] of the Act.

Regional Administrator Wilks agrees with the Minnesota Supreme Court that the Minnesota statute, which does not place the lien upon the property of the third party but instead places it on the recipient's property, would be illegal under 1396p.

Deference to agency interpretation is called for only when there is an ambiguity in the expression of congressional intent. Chevron, 467 U.S. at 842 (1984) ("If the intent of Congress is clear, that is the end of the matter."). There is no ambiguity in the statement that "no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan..." 42 U.S.C. § 1396p(a)(1). Similarly, the federal assignment requirement and the third-party recovery provision are not ambiguous. Because the intent of Congress is clear, there is no need for deference to an agency interpretation on the grounds that the statute is ambiguous.

Even assuming that the federal assignment requirement and third-party recovery provision inject some ambiguity into

federal law, agency deference is still not appropriate. When an agency statement does not reflect formal rules, yet attempts to address an ambiguity in the law, deference to the agency under Chevron is not appropriate. Christensen v. Harris County, 529 U.S. 576, 587 (2000) (concluding that opinion letters, policy statements, agency manuals, and enforcement guidelines are not warranted Chevron-style deference). Such agency interpretations are only "entitled to respect...to the extent that those interpretations have the power to persuade." Id. See also Wis. Dep 't of Health and Family Servs. v. Blumer, 534 U.S. 473, 122 St. Ct. 962, 976 (2002) ("The Secretary [of Health and Human Services'] position [regarding Medicaid law] warrants respectful consideration.").

The State urges deference to various agency letters, directives, and approvals demonstrating the agency's interpretation that the no-lien provision does not prohibit a state from recovering non-assigned damages in order to satisfy its separately owned claim for medical expenses. These materials include a "Best Practices Guide" that cites Minnesota's subrogation statute as "model legislation" and various letters from HCFA's administrators to state administrators and others stating that medical assistance liens are not prohibited under federal law. These agency materials are not accorded deference because they do not reflect formal rules or adjudications. Christensen, 529 U.S. at 587.

There is no explanation as to who wrote (as opposed to signed) the documents and there is no cross-examination of the authors to support the validity of the opinions stated. This, of course, is the very reason the Supreme Court in Christensen refused to give Chevron-style deference to such evidence. By failing to adopt its position under proper notice-and-comment rulemaking procedures, HCFA allowed no avenue for those members of the general public who will be most affected by the rule to give their input. HCFA did not allow the general public, or interested groups such as

numerous state Associations for Retarded Citizens (both the Minnesota and New York ARCs were *amici* in the Minnesota Supreme Court), to critique whatever reasoning went into the adoption of the agency position. Under these circumstances, the Court should not defer to HCFA.

D. This case does not present a question of national importance.

This case represents a case of importance in Minnesota. The State can seek to pass a law in Minnesota which places a lien on the property of third parties or can seek other legislation to change the common law of Minnesota as to whether a cause of action is property or the legal effect of an assignment of a discrete right to medical expense damages. Because of the limited scope of the Minnesota ruling, which does not address the priority issue in circumstances where there is a limited pool of funds to make a complete recovery, the rulings of the other states are not jeopardized nor does any true conflict exist. The result in this case is so entangled in the particular statutes and the particular common law of Minnesota, that the Supremacy Clause question cannot be effectively isolated. Thus, no question of national importance exists, and if this Court were to grant certiorari, it would be rendering an advisory opinion on an abstract question not raised by the decision of the Minnesota Supreme Court.

E. Martin is correct as a matter of law under the circumstances of this case and the purposes of the Act were appropriately considered.

This argument of the State is premised upon the erroneous notion that the *primary* purpose of the Medicaid law is to make the State the payor of last resort. In support of this argument, the State cites to legislative history contained in H.R. Rep. 95-393 (set out at A 291-93). This report merely has the words "Medicaid as Payor of Last Resort" as a title to a section of the report without any context indicating the conclusion that this is the primary purpose of the Act or any

amendment to the Act. In fact, it is clear from reading the report that the bill passed was intended to stop the practice of "some private insurance companies" whose policies "contain a provision that limits the insurance companies' liability to the amount not covered by Medicaid...[T]he bill would provide an incentive to States to stop this practice...". This is hardly a statement by Congress that the primary intent of the Medicaid law is to take away the recipients' rights to recovery for damages other than medical expenses.

In fact, the purpose of the Act as expressed by Congress is set forth in the preamble to the Act. 42 U.S.C. § 1396. RA 6. The Minnesota Supreme Court correctly assessed the dual purposes that were objectives of the Act:

> The three federal statutes reflect dual federal objectives: first, protection of the recipient's limited assets from encroachment by the state for reimbursement for medical expenses paid; second, requiring recovery and reimbursement from third parties liable for the recipient's medical expenses that were paid by Medicaid. The statutes reflect these objectives by insulating the recipient's property from the state's recovery through the anti-lien provision, while at the same time requiring assignment to the state of the recipient's right to collect from third parties liable for the costs of medical care paid by the state and by requiring the state to exercise its recovery rights.

A 27. The purpose of the Act is to pay the medical and rehabilitation expenses of citizens who are disabled, but at the same time, to give the recipients a dignified life by preventing the states from taking the property of recipients during their lifetime to repay the expenses. The Minnesota Supreme Court gave due regard to the purpose of Congress in passing the Act and interpreted the Act so as to give effect to the plain

meaning of its provisions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: August 22, 2002

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Medical Assignment

As a condition of eligibility for medical assistance assign to the State of Minnesota my rights available to me under automobile or private health care coverage and my rights to payment for medical care from any third party for myself or my dependents. I agree to cooperate with the State in any legal action brought against a third party for payment of medical expenses or subsistence.

STATE OF MINNESOTA
COUNTY of Olmsted
PUBLIC ASSISTANCE LIEN
of
STATE of MINNESOTA
by the
Minnesota Department of
Human Services

On the Cause of Action of
Troy C. Hoff
Office of County Recorder
of Olmsted County
Minnesota.

I hereby certify that the within instrument was filed in my office on the 21st day of June, 1993, at 8:00 0'clock AM.

County Recorder

By: S/_____
Joan M. Boesen
Deputy

PUBLIC ASSISTANCE LIEN

State of Minnesota
County of Ramsey

The undersigned, an authorized representative of the Minnesota Department of Human Services, represents and states:

That on information and belief, Troy C. Hoff has or may have a cause of action arising out of the following injury or other occurrence of July 11, 1991 at Rochester, Minnesota, and required medical care and/or subsistence due to the following injury: Injuries sustained in an auto accident. That said occurrence has resulted in the payment of the following public assistance benefits, through the Olmsted County Welfare Department, to or on behalf of Troy C. Hoff.

Vendor or Type	Dates (and ongoing)	Amount (and ongoing)
Medical Benefits: Red Wing Health Care and et al	07-11-9	$ 267 7 54.50
Subsistence Benefits:		$_____
Other:		$_____
Current Total:		$ 267,754.50 and Ongoing

The amount stated above represents only that amount which is known and determined to be due at this time. In addition thereto, this claim of lien shall include future public assistance benefits paid as a consequence of the above described occurrence.

That to the best of the undersigned's knowledge, the names and addresses of all persons, firms and corporations claimed by the injured person to be liable for damages arising out of the injuries are as follows:

Joan Martin as mother or guardian to Troy C. Hoff	428 - 6th Street SW Apartment 302 Rochester, MN 55902
American Family Insurance as insurer for Donald Tlougan	1027 - 7th Street NW Rochester, MN 55901

That pursuant to Minn. Stat. 256.015 and 256B.042, the Minnesota Department of Human Services for the State of Minnesota does hereby claim a lien for the cost of the aforesaid public assistance benefits provided to the injured person, upon any and all causes of action accruing to said injured person, or to his legal representative as a result of the aforesaid occurence.

S/_____

Authorized Representative
Minnesota Department of Human Services

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

The undersigned, being duly sworn, and upon oath states, that he/she is an authorized representative of the Department of Human Services and that he/she did make and sign the foregoing instrument, and that the same is true to the best of his/her knowledge.

S/_____

Subscribed and sworn to before me this
10 th day of June, 1993
Notary Public, Anoka County,Minnesota. My commission expires:
August 9, 1994

To be served according to Minn. Stat. 514.69 on the following:

Joan Martin
428 - 6th Street SW
Apartment #302
Rochester, MN 55902

American Family Insurance
Claim No.351-022742-0212
1027 - 7th Street NW
Rochester, MN 55901

James R. Koby
Attorney-at-Law
600 Exchange Boulevard
205 - 5th Avenue South
La Crosse, WI 54602

Charles A, Bird
Attorney-at-Law
305 Ironwood Square
300 - 3rd Avenue SE
Rochester, MN 55904

Sec. 1396. - Appropriations

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish

(1)

medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and

(2)

rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance

Sec. 1396a. - State plans for medical assistance

(a) Contents

A State plan for medical assistance must –

(18)

comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts;